Filed 5/5/06 MSPal, Inc. v. Xiamen Xiashun Aluminum Foil CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MSPAL, INC., Plaintiff and Appellant, v. XIAMEN XIASHUN ALUMINIUM FOIL, LTD., Defendant and Respondent.	B183961 (Los Angeles County Super. Ct. No. BC322411)

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Wu, Judge. Affirmed.

Chad Biggins for Plaintiff and Appellant.

Greenberg, Glusker Fields Claman Machtinger & Kinsella, William M. Walker, Cambra E. Sklarz for Defendant and Respondent.

The plaintiff, a Canadian corporation, has sued a Chinese corporation for allegedly violating a contract. The trial court dismissed the case for lack of personal jurisdiction over the foreign defendant. We affirm. The plaintiff has not carried its burden of demonstrating that constitutionally sufficient "minimum contacts" exist between the defendant and California to justify the imposition of jurisdiction.

FACTS

MSPal, Inc., has sued Xiamen Xiashun Aluminum Foil, Ltd., (Xiashun) for allegedly failing to pay commissions MSPal earned on the sale of Xiashun's products. MSPal also alleges that Xiashun terminated the parties' Service Agreement (the Agreement) without good cause. In the Agreement, MSPal agreed to use its best efforts to sell Xiashun's aluminum foil in North America, and Xiashun agreed to pay MSPal a sales commission. The Agreement contains a clause requiring the parties to submit any disputes to binding arbitration in Hong Kong. The Agreement is governed by Hong Kong law.

Xiashun moved to (a) dismiss the complaint based on a lack of personal jurisdiction, or (b) stay the action pursuant to the doctrine of forum non conveniens. Xiashun argued that it has no minimum contacts with California sufficient to support jurisdiction. Xiashun also asserted that the forum clause in the Agreement mandates that any disputes between the parties be resolved by arbitration in Hong Kong.

With respect to its contacts with California, Xiashun submitted a declaration from its chairman, general manager and director, who declared that Xiashun is a Chinese corporation, with its principal place of business in China. Xiashun does not do business in California, and has never had offices, employees, property, contracts or bank accounts in California, nor is it qualified to do business or have an agent for service of process here. Xiashun had no expectation that MSPal would direct any marketing efforts toward California, because California does not have a concentration of companies that consume Xiashun's foil products. No contracts have been entered into for product sales in California, and Xiashun derives no revenue from California. The negotiations between Xiashun and MSPal took place in China. MSPal located only two customers for Xiashun,

both outside of California. Litigating here would impose a substantial burden on Xiashun, because none of its witnesses speak English and it would be difficult and costly for them to travel to California to participate in this litigation.

In opposition to Xiashun's motion to dismiss, MSPal argued that there is a statutory basis for asserting personal jurisdiction over Xiashun in California, and that the contractual arbitration clause is void. Furthermore, MSPal contended, Xiashun has contacts with California. MSPal is a Canadian corporation, with its principal place of business in Quebec. It was hired by Xiashun as a sale representative to solicit wholesale orders for Xiashhun's products. MSPal claims to have made a sale of Xiashun's foil to Alcan Packaging (Alcan) in Newark, California, but no copy of the Alcan sales invoice or contract appears in the record. Most of Xiashun's products enter North American through the Port of Long Beach. MSPal's president and CEO Michel St. Pierre states that the arbitration clause was inserted into the Agreement without his knowledge or consent.

In response, Xiashun asserted that jurisdiction must fall within constitutional standards and cannot be conferred by statute. MSPal has not shown the requisite minimum contacts to support jurisdiction, because mere sales solicitations by an independent agent do not confer jurisdiction over a foreign entity. Xiashun and Alcan, the purported California buyer, denied any business relationship. Xiashun's products enter North American through the Port of Long Beach, but they are destined for customers outside of California. Xiashun observed that MSPal proposed the inclusion of an arbitration clause. After negotiation, the parties agreed to use Hong Kong as the forum.

THE TRIAL COURT'S RULING

At the hearing, the court found that Xiashun has no offices, employees, bank accounts, real property, or other connections to California. The court stated that there is no evidence that Xiashun does business in California, and that merely soliciting purchasers in California does not create jurisdiction. A single sale in California would be insufficient to confer jurisdiction. There is no evidence that Xiashun's products caused

an injury in California. Shipping the foil through a California port does not provide a basis for jurisdiction because there is no evidence that the dispute arises from the shipments themselves. There is no evidence that commissions were going to be paid in California. The court concluded, "California has really no interest in this matter whatsoever."

The trial court granted Xiashun's motion and dismissed MSPal's case on April 19, 2005, on the grounds that California lacks jurisdiction. This appeal was filed on June 17, 2005.

DISCUSSION

1. General Principles Regarding the Exercise of Jurisdiction

California's "long arm" statute permits the exercise of jurisdiction over nonresident defendants to the extent allowed by the state and federal constitutions. (Code Civ. Proc., § 410.10; *Snowney v. Harrah's Entertainment, Inc.* (*Snowney*) (2005) 35 Cal.4th 1054, 1061.) The court weighs the facts of each case to determine whether a nonresident defendant has sufficient "minimum contacts" with California so that the exercise of jurisdiction is reasonable and comports with principles of fair play and substantial justice. (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316-317; *Snowney, supra,* 35 Cal.4th at p. 1061.)

A nonresident who engages in substantial, continuous, and systematic activities in a state is subject to its "general" jurisdiction. (*Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 445-446; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445.) A nonresident who has no substantial, systematic contacts with a state may be subject to its "specific" jurisdiction if the nonresident has purposefully availed itself of the benefits and protections of the state's laws; the controversy arises out of the nonresident's contacts with the state; and it would be fair and just to assert jurisdiction. (*Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472; *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269; *Vons Companies v. Seabest Foods, Inc., supra,* 14 Cal.4th at p. 446.) Jurisdiction "depends upon the quality and nature of [the defendant's] activity in

the forum in relation to the particular cause of action." (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147-148; *Kulko v. California Superior Court* (1978) 436 U.S. 84, 92.)

When jurisdiction is challenged by a nonresident defendant, the initial burden is on the plaintiff to demonstrate, with competent evidence, that minimum contacts exist between the defendant and California to justify imposition of personal jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 110.) If the plaintiff meets this burden, the defendant must show that the exercise of jurisdiction would be unreasonable. (*Snowney, supra,* 35 Cal.4th at p. 1062; *Edmunds v. Superior Court* (1994) 24 Cal.App.4th 221, 228.) If the defendant is a national of another country, the courts pay especially close attention to the jurisdictional facts. (*Asahi Metal Industry Co. v. Superior Court* (1987) 480 U.S. 102, 115; *In re Automobile Antitrust Cases I & II, supra,* 135 Cal.App.4th at pp. 109-110.)

2. <u>Substantial Evidence Supports the Trial Court's Findings</u>

The parties presented conflicting evidence. MSPal claims to have sold Xiashun's foil to a company in California. Xiashun denies selling its products in California. MSPal claims that the arbitration clause was a nonnegotiated term that was inserted in the Agreement without its knowledge. Xiashun asserts that the arbitration term was proposed by MSPal and was fully negotiated. When there is a conflict in the evidence, the appellate court reviews the trial court's jurisdictional findings to determine whether they are supported by substantial evidence. (*Vons Companies v. Seabest Foods, Inc., supra,* 14 Cal.4th at p. 449.)

First, no proof was offered in the present case that Xiashun's contacts with California are substantial, continuous and systematic, such that it is subject to the state's general jurisdiction. It is undisputed that Xiashun has no offices, no employees, no bank accounts, and no property in California. Xiashun's products are shipped through Long Beach, en route to North American destinations outside of California. The brief, transitory contact between California and a foreign defendant's products destined for out-of-state customers does not constitute a reason for imposing jurisdiction. In *Glencore Grain v. Shivnath Rai Harnarain* (9th Cir. 2002) 284 F.3d 1114, 1124-1125, a foreign

defendant who shipped rice into the United States through California ports was not subject to personal jurisdiction in California. Other than making the shipments, the defendant owned no property, kept no bank accounts, solicited no business, and had no employees in California. As the court noted, "while it is clear that [the defendant] has stepped through the door, there is no indication that it has sat down and made itself at home" in California. (*Id*. at p. 1125. Accord: *DeJames v. Magnificence Carriers, Inc.* (3d Cir. 1981) 654 F.2d 280, 285-286; *Federal Ins. Co. v. Lake Shore Inc.* (4th Cir. 1989) 886 F.2d 654, 659.)

Second, there is no substantial evidence that Xiashun purposefully availed itself of the benefits and protections of California law in a manner that would justify the exercise of specific jurisdiction. Other than shipping its products through Long Beach, Xiashun's only other contact with California is that MSPal solicited several potential customers here for Xiashun's foil products. Personal jurisdiction may be imposed "[b]ased on defendants' purposeful *and successful* solicitation of business from California residents" thereby creating a substantial connection with the state. (*Snowney, supra*, 35 Cal.4th at pp. 1062-1063, italics added.) Xiashun did not purposefully target California as a market because California does not have a concentration of companies that consume its products. More important, there is no evidence that any solicitation of business in California was actually successful. MSPal listed one California buyer, Alcan, but Alcan expressly denied that it purchased Xiashun's products. The trial court resolved this factual conflict in favor of Xiashun, finding that "[t]here is no evidence that defendant does--or did do any business in California."

To create an expectation of being haled into court here, the defendant's contacts must be more than "'"random," "fortuitous," or "attenuated."'" (*Snowney, supra*, 35 Cal.4th at p. 1063.) For example, a hotel may be subject to jurisdiction in California by maintaining a Web site aimed at California residents, deriving substantial business from Californians who respond to the Web site, and advertising extensively in California through billboards, newspapers, radio, direct mailings and television. (*Id*. at pp. 1064-

1065.) There was no showing in the present appeal that Xiashun directed any advertising at California consumers.

There is no evidence that this controversy arises out of Xiashun's contacts with California, a showing that requires "'a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim.'" (*Snowney, supra,* 35 Cal.4th at p. 1068.) MSPal claims that there is a nexus between its claim and Xiashun's forum activities because commissions are due and owing on California sales. However, Xiashun and the purported customer, Alcan, both denied that MSPal made a sale in California. The trial court resolved this factual dispute in favor of Xiashun. The finding is supported by substantial evidence, inasmuch as there is no proof of any purchase contract or invoice between Xiashun and a California foil consumer.

3. Effect of the Independent Wholesale Sales Representatives Contractual Relations Act of 1990

MSPal largely relies upon Civil Code section 1738.10, the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 (the Act). (Civ. Code, § 1738.10 et seq.)[1] The purpose of the Act is to "provide security and clarify the contractual relations between manufacturers and their nonemployee sales representatives." (§ 1738.10.) It applies to manufacturers "engaged in business within this state" who hire representatives on commission "to solicit wholesale orders at least partially within this state." (§ 1738.13, subd. (a).) A wholesale sales representative refers to a person who contracts with a manufacturer for the purpose of soliciting wholesale orders, and is compensated with a commission; it does not include one who sells or takes orders for the direct sale of products to the ultimate consumer. (§ 1738.12, subd. (e).) A manufacturer "who is not a resident of this state, and who enters into a contract regulated by this chapter is deemed to be doing business in this state for purposes of personal jurisdiction." (§ 1738.14.)

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[1] All further statutory references in this opinion are to the Civil Code.

MSPal argues that the Act confers jurisdiction over Xiashun, because Xiashun is a manufacturer and MSPal is a wholesale sales representative who solicited orders from California buyers. MSPal is stretching the purpose of the Act beyond its reasonable scope. The Act cannot apply to a nonresident sales representative who tries, unsuccessfully, to solicit buyers in California. There is simply no tangible proof that Xiashun is a manufacturer "engaged in business within this state." (§ 1738.13, subd. (a).)

California cannot offer its judicial resources to a Canadian corporation that enters a contract, outside of California, to represent a Chinese corporation that does not sell its products in California. If making any sort of failed effort to sell a product in California gave rise to jurisdiction here, our courts would quickly be inundated by the claims of foreign sales representatives, who lack even the most tenuous ties to California.

In any event, the Act does not confer personal jurisdiction in California if the defendant has no constitutionally sufficient minimum contacts with this state. "It is a bedrock principle of civil procedure and constitutional law that a 'statute cannot grant personal jurisdiction where the Constitution forbids it.'" (*Glencore Grain v. Shivnath Rai Harnarain, supra,* 284 F.3d at p. 1121.) As discussed above, Xiashun has no contacts with California, other than the trivial contact of shipping its foil through California ports to non-California buyers. Without constitutionally recognizable minimum contacts, Xiashun cannot be haled into court in this state.

4. <u>Effect of the Forum Selection Clause</u>

In light of our conclusion that Xiashun has no constitutionally sufficient minimum contacts with California, we need not address the issue of the forum selection clause, inasmuch as it has no impact on our determination that California is not a proper forum.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.